88-146

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MIGUEL MATOS,

Petitioner,

– against –

EUGENE S. LE FEVRE, Superintendent,
Clinton Correctional Facility,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MORGAN KENNEDY
Attorney for Petitioner
133 East 15th Street
New York, New York 10003
(212) 228-3269

QUESTIONS PRESENTED FOR REVIEW

An apartment tenant and his room-mate and lover were jointly arrested at home in police raid circumstances. There was no warrant, and no exigent circumstances. **Payton v. New York, 445 U.S. 573,** made applicable by **U.S. v. Johnson, 457 U.S. 537,** applied to this arrest. The room-mate, without receiving any Miranda warnings, responding to interrogation, implicated the tenant. The police then confronted the tenant with his lover's statements, and the tenant then confessed to a double murder.

When the police confront an arrestee with evidence of his own guilt, in an attempt to secure a confession, does that confrontation constitute an attenuating event under either the Fourth or Fifth Amendments, which

neutralizes the taint of that arrestee's illegal arrest?

Do such confrontations constitute an attenuating event, in that such confrontations with incriminating evidence would tend to reinforce the arrestee's sense of free will?

Does **Stone v. Powell** preclude lower court review of the foregoing questions?

TABLE OF CONTENTS

TABLE OF CITATIONS

APPENDIX

In the

Supreme Court of the United States

==========

October Term, 1988

MIGUEL MATOS,

Petitioner,

-against-

EUGENE S. Le FEVRE, Superintendent,
Clinton Correctional Facility,

Respondent.

==========

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

==========

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Miguel Matos, hereby petitions for a writ of certiorari to review a judgment of the Supreme Court

of the State of New York, New York County, rendered July 1, 1980, convicting him of 2 counts of murder in the second degree.

OPINIONS BELOW

In this habeas corpus proceeding, the only federal decision consists of the report by Magistrate Grubin at A-3. In the state courts, a decision was made by the Appellate Division (A-53).

JURISDICTION

This habeas corpus petition was dismissed by order of the District Court, dated October 30, 1987 (A-51). The Court of Appeals denied a certificate of probable cause to appeal therefrom, and dismissed the appeal, in an order filed May 24, 1988 (A-1). This Court has jurisdiction to review this case by reason of 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case principally involves the Fourth Amendment, and tangentially involves the Fifth Amendment, and principles of voluntariness.

STATEMENT OF MATERIAL FACTS

On January 24, 1979, Charles Fashaw and Karen Guy were murdered in their apartment. There were indications that a man and woman had been involved. An informer, who had received information through a series of prior persons, spoke to a police officer, focusing attention on Miguel Matos, and his girl-friend and room-mate. Prior to this tip, there was no reason to suspect them. On March 12, 1979, at 5:30 PM, the police went to Matos' apartment house, and then departed, although Matos was present. That night, at 9:30 PM, 12 officers, in flak

vests, riot gear, and with shotguns, gathered in Matos' building corridor. They had no warrant. One officer admitted that this arrest was to "interview" Matos. They phoned his apartment, and told Matos to open the door or else it would be broken down. Matos opened the door, and the police rushed inside. No Miranda warnings were given in the apartment, as Matos was handcuffed. Christine Perdicaro, his 16 year old lover, was also under arrest.

Matos and Perdicaro were driven to the police station in different cars. In the car with Perdicaro, the police drove her on an extended trip around the park, and told her they were investigating the Fashaw-Guy double murder. Perdicaro began crying hysterically, then settled down. In the car, she ultimately stated that Matos had

murdered them, because Charles Fashaw had raped Perdicaro.

At the precinct, Perdicaro wished to speak with Matos, but was not allowed to. About 1 1/2 hours after the arrest, 2 detectives who participated in that arrest gave Matos Miranda warnings, and began interrogating him. They started by telling Matos that Perdicaro had told the police all about the rape. Upon hearing that, Matos confessed. There were 2 further interrogations that night, which duplicated the content of the first interrogation. Upon the conclusion of all the interrogations, Matos was permitted to speak with Perdicaro. At no time during the arrest or interrogations, was Matos ever advised that he was a suspect in a double murder.

Payton v. New York, 445 U.S. 573, was decided prior to the state suppression court's decision. That decision denied suppression of the confessions, holding that **Payton** had no retroactive effect, and no application. Matos was subsequently convicted, in a judgment rendered July 1, 1980.

On direct appeal to the Appellate Division, First Department, in an order entered April 21, 1983 **(A - 57)** that court held that **Payton** applied, by reason of **U.S. v. Johnson, 457 U.S. 537.** The Appellate Division agreed that no exigent circumstances had been present. However, it concluded that all taint had dissipated, because the officer confrontated Matos with incriminating evidence:

> "However, defendant's inculpatory statements in the station house one and one-half hours after he was

> arrested, and after he received Miranda warnings, were admissible, inasmuch as any potential taint because of the circumstances of the arrest had been attenuated in the interval. His statements were voluntarily made and were elicited after Perdicaro's statements implicating him had been made to the police, and after he had been advised that 'she told us about the rape....'"(A - 57).

The New York Court of Appeals denied permission to appeal, and a habeas corpus case was commenced in the District Court (S.D.N.Y.). It was urged that a confrontation with incriminating evidence would not give an arrestee a sense of his own free will; it was also argued that Perdicaro's statement was directly referable back to the same illegal arrest, and could not be used as a predicate to sustain Matos' own confession. In addition, he said that his counsel had to be allowed to examine the 2 informers, and the

officer in contact with them. The case was referred to Magistrate Grubin, who recommended dismissal, based on **Stone v. Powell, 428 U.S. 465** (A-32). The District Court adopted the recommendation, dismissed, and then denied a certificate of probable cause. The Court of Appeals denied a certificate of probable cause, and dismissed the appeal. No hearing was held in federal court.

REASONS FOR GRANTING THE WRIT

Under either Fourth or Fifth Amendment standards, when the police confront an arrestee in custody with evidence of his guilt, that confrontation does not instill a sense of voluntariness in that arrestee, such as to attenuate taint. In addition, the application of Stone v. Powell should be re-examined, in light of Congress'

grant of subject-matter jurisdiction to the District Courts.

It is a familar practice for police to confront arrestees in custody with evidence of their guilt, in order to stimulate a confession. Yet, there is not any recognized body of law on that police technique. Nevertheless, several of this Court's cases indicate that such confrontations do not attenuate taint.

In **Reck v. Pate, 367 U.S. 433, 443-444,** Reck had been confronted with his co-arrestees' prior statements, and this Court held that this confrontation could have been the weight which overcame Reck's resistance. In **Brown v. Illinois, 422 U.S. 590,** the police told Brown that they knew he had fired a bullet, and they had the bullet; Brown then confessed. This Court held

that "[T]here was no intervening circumstance of significance whatsoever." **(422 U.S. at 604).** The confrontations in **Reck** and **Brown** were with legally seized evidence.

Beyond **Reck** and **Brown,** this was a confrontation with evidence procured by the very same illegal arrest. **Fahy v. Connecticut, 375 U.S. 85,** indicates that the police may not use illegally-recovered evidence to trigger a confession. In **Taylor v. Alabama, 457 U.S. 687,** the police told Taylor that his fingerprints matched the prints on the stolen bag; he then confessed. The Court held:

> "The initial fingerprints, which were themselves the fruit of petitioner's illegal arrest... and which were used to extract the confession from petitioner, cannot be deemed sufficient 'attenuation' to break the connection between the illegal arrest and the confession...."

No hearing has been held on this petition, but various facts were raised, which militate against a finding of attenuation. This was a mass, heavily armed arrest. 2 of the arresting detectives conducted the first and second interrogations, which would tend to remind Matos of that arrest. The police purpose in this arrest was flagrant - it was admittedly for an "interview," meaning an interrogation. The police did not possess any probative, admissible evidence at the time of the arrest. The arrest was a fishing expedition, not based on evidence at hand.

This case cannot be disposed of on standing grounds, related to Perdicaro, because the ultimate question is whether something attenuated the illegal arrest of Matos. We do not

seek to suppress Perdicaro's statement - only Matos' confessions. Also, Perdicaro was arrested inside of Matos' own apartment, where he had a lease.

It was urged in this habeas corpus that New York had perverted the doctrine of attenuation, by holding that a coercive circumstance constituted attenuation. The brief annexed to the petition stated:

> "[N]ow the New York police can conduct an illegal multiple arrest with impunity, knowing that its courts will hold that the first confession purges the taint with respect to the subsequent confessions of the other co-arrestees." (p. 34).

This case also presents questions about the application of **Stone v. Powell.** The state courts had already found the existence of taint, holding the arrest illegal, before this petition was brought. The petition basic-

ally addressed Matos' state of mind, and principles of voluntariness, by arguing that this confrontation would not attenuate this pre-established taint. It was argued that **Stone v. Powell** did not preclude the District Court from considering this question. But, because a pre-determined Fourth Amendment illegality was in this case, the petition was dismissed, without review of the merits. Chief Judge Burger indicated in **Stone v. Powell** that it applied to tangible physical evidence, like drugs or weapons, rather than confessions **(428 U.S. at 496-497).** Nevertheless, lower federal courts give the **Stone** doctrine a very broad application, holding that it does apply to confessions, and, as this case indicates, even to attenuation issues.

Congress vested the district courts

with unlimited jurisdiction to consider all cases founded upon the Constitution, without exception for any amendment of the Constitution **(See, e.g., 28 U.S.C. 2254, subd. [a]; 28 U.S.C. 1331; 28 U.S.C. 1346, [a] [2]).** By expanding upon the limited holding of **Stone v. Powell,** lower federal courts are determining the extent of their own subject-matter jurisdiction, which they are powerless to do.

The exclusionary rule rule applicable to confessions may be judicially-created, but it has never been judicially abrogated. The 4th Amendment exclusionary rule has full validity in federal criminal trials. In depriving habeas corpus petitioners of the benefit of that rule, Congress' grant of subject-matter jurisdiction has been limited.

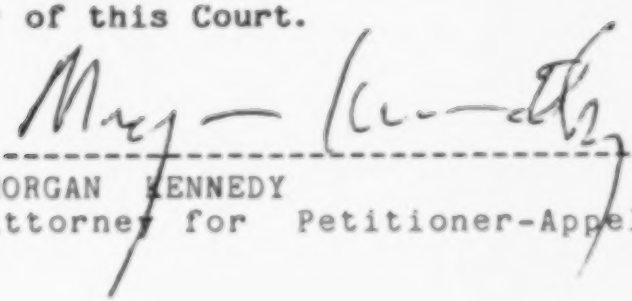
In this case, suppression would, in fact deprive the State of evidence with which to re-try Matos.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted, and, upon granting certiorari, the Court should suppress the confessions at issue.

Respectfully Submitted,

The foregoing is affirmed under the penalties of perjury by a member of the Bar of this Court.



MORGAN KENNEDY
Attorney for Petitioner-Appellant

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of May, one thousand nine hundred and eighty-eight.

----------x

MIGUEL MATOS, :

Appellant, :

v. : 87-2466

EUGENE LeFEVRE, :

Appellee. :

----------x

A motion having been made herein by appellant pro se for certificate of probable cause

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied, and the appeal is dismissed.

_____

_____

_____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MIGUEL MATOS, Petitioner, - against - EUGENE S. LEFEVRE, Superintendent, Clinton Correctional Facility, Respondent.	REPORT AND RECOMMENDATION TO THE HONORABLE THOMAS P. GRIESA 84 Civ. 2711 (TPG)

GRUBIN, United States Magistrate:

Petitioner Miguel Matos seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction upon a jury trial in the Supreme Court of the State of New York, New York County, of two counts of murder in the second degree (N.Y. Penal Law § 125.25). Petitioner was sentenced on July 1, 1980 to concurrent terms of imprisonment of twenty years to life and twenty-five years to life. His conviction

was unanimously affirmed by the Appellate Division, First Department, in an opinion issued on April 21, 1983 (People v. Matos, 93 A.D.2d 772, 461 N.Y.S.2d 341), and the Court of Appeals of the State of New York denied leave to appeal on June 17, 1983 (People v. Matos, 59 N.Y.2d 975, 466 N.Y.S.2d 1036).

The petition asserts three grounds for relief. The first ground presented is that inculpatory statements made by petitioner to the police and to an assistant district attorney following a warrantless, unlawful arrest should have been suppressed because, contrary to the finding of the state courts, there were no attenuating circumstances breaking the causal link between the illegal arrest and the statements. The second ground asserted is that the trial judge violated petitioner's

sixth amendment right to confront the witnesses against him by conducting ex parte in camera examinations of a police investigator and two government informants during the suppression hearing. The remaining ground is that the trial judge's conduct during testimony of one of the prosecution witnesses and during colloquy with counsel deprived petitioner of a fair trial. For the reasons set forth below, I respectfully recommend that the petition be dismissed with respect to the first two grounds and denied with respect to the third ground.

BACKGROUND

Facts

The facts relevant to the instant petition are generally undisputed and may be summarized as follows. On January 24,

1979, an individual named Charles Fashaw and his girlfriend, Karen Guy, were shot to death in Fashaw's apartment on East 94th Street in Manhattan. On or about March 5, 1979, Sergeant John Cuddy, a special investigator for the Nassau County District Attorney's Office, telephoned a former colleague, Detective James Saitta of the New York City Police Department, and told Saitta that he had received information from an informant, "A," whom Cuddy knew and considered to be a reliable source, concerning a double homicide on East 94th Street in Manhattan. Informant A had in turn received the information from another informant, denominated "B" by Sergeant Cuddy. Cuddy telephoned Saitta again a few days after their initial conversation, told him that he had again spoken with A and that A had given him the names and a description of a male and a

female allegedly involved in the killings. Cuddy then spoke to Saitta again on March 10 or 11 and gave him the address and telephone number of petitioner, who was the man who allegedly committed the crime. Saitta thereafter give the information obtained from Cuddy to Detective John Quealy, who had been put in charge of the homicide investigation, and to Quealy's colleague Detective James Porter.

On March 12, 1979 at approximately 9:30 p.m., police officers, acting primarily on the basis of the information supplied by A to Cuddy, forcibly entered petitioner's apartment without a warrant and placed him under arrest. Petitioner's girlfriend, Christine Perdicaro, who was in the apartment at the time was also taken into custody.

Petitioner and Perdicaro were driven separately to the station house. Detective Porter and his partner Robert Abrahamsen informed Perdicaro during the ride that they were investigating the murders of Charles Fashaw and Karen Guy. Perdicaro began to cry and told them that petitioner had killed Fashaw and Guy because Perdicaro had told him that Fashaw had raped her. When petitioner arrived at the station house at approximately 11:00 p.m., he was initially interviewed by Porter. It is undisputed that Porter gave petitioner Miranda warnings and that petitioner understood them prior to making any incriminating statements. Porter told petitioner that he was investigating the killings of Fashaw and Guy. Petitioner asked the detective how Perdicaro was and Porter replied, "She's okay, don't worry about her, and she told us about the rape."

(Tr. 920-21.)[1] Petitioner then admitted that he had killed Fashaw and Guy because Perdicaro had told him that Fashaw had raped her. After this initial interview, which lasted approximately thirty to forty-five minutes, Detective Quealy arrived and conducted a second interview of petitioner at which Porter and Abrahamsen were also present. Quealy asked if petitioner had been advised of his rights by Porter, and petitioner responded affirmatively. Quealy then proceeded to obtain a second, stenographically recorded statement in which petitioner admitted killing Fashaw and Guy. (Tr. 693-700.) At approximately 2:00 a.m., Assistant District Attorney Steven Cronin arrived at the station house,

---

[1] Page numbers preceded by "Tr." refer to the trial transcript. Page numbers preceded by "D." refer to the separately bound transcript of the "Decision" dated February 5, 1980 which was rendered following the suppression hearing.

and after again advising petitioner of his Miranda rights, elicited a third statement by petitioner, also stenographically recorded, in which he again admitted killing Fashaw and Guy (Tr. 649-61).

Petitioner's trial took place from May 6 through May 19, 1980 before New York State Supreme Court Justice Edward J. Greenfield Officers Quealy, Porter and Abrahamsen each testified as to the statements made by petitioner during the interviews at the station house, and the statements were admitted into evidence. The prosecution also called Christine Perdicaro as a material witness. On direct examination, Perdicaro stated that she could not remember the events that had taken place on the night of the murders, even though they had been recorded in her statement to the police and she had testified about them before the grand jury.

She further testified that she did not recall what she had told the police or to what she had testified in front of the grand jury. At the request of the prosecutor, and out of the presence of the jury, the trial judge told Perdicaro that in light of her testimony the court was obliged to advise her that her immunity from prosecution did not render her immune from prosecution for perjury or criminal contempt and she could be subject to prosecution for perjury if it were to be determined that her testimony were untrue. He also ensured that her attorney had advised her about the potential consequences in that regard (Tr. 293-97). Thereafter, on cross-examination after the return of the jury, Perdicaro testified that the police had threatened to arrest her if she did not sign a statement implicating petitioner in the murders and

that she had signed the statement because she was "frightened" (Tr. 337-44). The trial judge then asked Perdicaro if "[y]ou remember all those things ...? ... You remember how you felt at that moment?" (Tr. 342.) He also asked additional questions of Perdicaro at several points during her testimony (Tr. 324-25, 339-40, 344, 348, 363, 364, 374-75, 376, 378). During one sidebar conference petitioner's counsel complained that at various times during Perdicaro's cross-examination, the trial judge had assumed facial expressions that indicated his disbelief of the witness, had interjected himself into the proceedings by asking questions on matters which were not unclear and had spoken to the witness in a severe and harsh tone which further indicated his disbelief in the witness' testimony (Tr. 354-56). The court rejected counsel's contentions (Tr. 356-58).

Subsequently, during the cross-examination of Detective Quealy, petitioner's counsel attempted to elicit from the witness that the police had located and interviewed an eyewitness who had seen the killer fleeing Fashaw's apartment building on the night of the murders (Tr. 769-70). The court sustained the prosecutor's objection to the questioning and told defense counsel, "[T]hat is an entirely improper question. You know it to be an improper question." (Tr. 770.) After counsel protested that he had not known the question was improper, the court responded , "You don't know basic rules of hearsay? You purport to have gone to law school." (Id.) At sidebar, the court told counsel that counsel had attempted to introduce hearsay evidence that he knew was improper without advising the court in advance, and the judge

rejected counsel's accusation that he had "berated" or "demeaned" him in front of the jury or used loud tones and facial expressions that prejudiced the defense (Tr. 771-90).

State court proceedings

Prior to trial, petitioner moved to suppress the statements given to the police and the assistant district attorney at the station house, contending that the statements were the fruit of an unlawful arrest. Petitioner challenged the arrest on essentially two grounds. First, that because the arrest was effected at night in the absence of exigent circumstances, it was illegal without a warrant and, alternatively, that the police lacked probable cause for the arrest because the information upon which such probable cause was allegedly based, the informants' tips,

constituted unreliable double hearsay (D. 6-9).[2] On February 5, 1980, after hearing testimony from Officers Porter, Quealy, Abrahamsen and Cuddy, as well as conducting in camera examinations of Cuddy and informants A and B in the absence of defense counsel, Justice Greenfield held that the warrantless arrest of petitioner in his home was proper under People v. Payton, 45 N.Y.2d 300, 408 N.Y.S.2d 395

---

[2] The law in New York at the time of the hearing was that an arrest made in a defendant's home without warrant and in the absence of exigent circumstances was not constitutional if based on probable cause. People v. Payton, 45 N.Y.2d 300, 408 N.Y.S.2d 395 (1978). The first prong of petitioner's argument appears to have been that his arrest was distinguishable from the daytime arrest sanctioned in Payton and that, in any event, as the Payton rule was then pending before the United States Supreme Court, he had the obligation to raise the issue to preserve his rights for appeal. As will be discussed, subsequent to petitioner's suppression hearing the Supreme Court reversed Payton, holding that a warrantless and nonconsensual entry into a suspect's home to make a routine arrest violates the fourth amendment.

(1978), and that there was no basis for suppressing petitioner's statements (D. 14-15, 17). The court found that based on the evidence adduced in open court and taken in camera, the police had probable cause to arrest petitioner (D. 17, 19). In this regard the court specifically found that the information supplied through the chain of informants to Cuddy and ultimately to the New York City Police were reliable, legitimately obtained information, that the information provided by the informants corroborated information obtained by the police from independent sources, and that the corroborating detail was sufficient to indicate the reliability of the informants for the information supplied (D. 16-17, 19). The court additionally noted that Cuddy had reasonably determined both informants to be reliable on the basis of his knowledge that

both had provided reliable information that had led to arrests and convictions in the past (D. 15, 18). The court further found that even if petitioner had been arrested without probable cause, his statements were admissible because Perdicaro's statements, which the court found to be admissible against petitioner and not open to challenge by him , attenuated any taint on petitioner's statements that might have been created by his arrest (D. 17, 20). Finally, the court found that petitioner had received proper Miranda warnings and that he had voluntarily waived his rights when he made his statements to the police and the prosecutor (D. 17). Accordingly, the court found no valid basis for challenging the admission of the statements at trial and denied petitioner's motion to suppress.

On April 15, 1980, the Supreme Court rendered its decision in Payton v. New York, 445 U.S. 573, holding that the fourth amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. Thereafter, Justice Greenfield reconsidered his ruling concerning the admissibility of petitioner's statements. On May 9, 1980, three days after the commencement of petitioner's trial, Justice Greenfield ruled that the Supreme Court's decision in Payton would not apply retroactively to petitioner's arrest and therefore reaffirmed his prior decision (Tr. 61-62, 64, 67).

During the period between petitioner's conviction and the Appellate Division's decision on his appeal, the Supreme Court decided United States v. Johnson, 457 U.S.

537 (1982), holding that the principles of Payton were to be applied retroactively to all convictions that were not final on the date of its Payton decision.[3] Although petitioner did not cite Johnson on appeal of his conviction to the Appellate Division, petitioner did argue, inter alia, that the principles of Payton should have been applied retroactively to his case and therefore his arrest should be deemed illegal and his inculpatory statements inadmissable.[4] The Appellate Division nevertheless unanimously affirmed petitioner's conviction on April 21, 1983

---

[3] A conviction is "final" when the availability of appeal and petition for certiorari has been exhausted. See United States v. Johnson, 457 U.S. at 543 n.8.

[4] Although no date appears on petitioner's brief to the Appellate Division, respondent's Appellate Division brief is dated February, 1982. Thus, petitioner's brief would have been filed prior to June 21, 1982, the date on which the Supreme Court rendered its decision in Johnson.

(93 A.D.2d 772, 461 N.Y.S.2d 341). In its opinion, the Appellate Division cited Johnson and acknowledged the applicability of the Payton rule to the case and further noted the hearing court's determination that no exigent circumstances existed to support the warrantless arrest. 93 A.D.2d at 772, 461 N.Y.S.2d at 341. However, based on the doctrine of attenuation, the court upheld the trial court's refusal to suppress petitioner's statements, ruling as follows:

> "[D]efendant's inculpatory statements in the station house one and one-half hours after he was arrested, and after he received his Miranda warnings, were admissible, inasmuch as any potential taint because of the circumstances of the arrest had been attenuated in the interval. His statements were voluntarily made and were elicited after Perdicaro's statements implicating him had been made to police, and after he had been advised that 'she told us about the rape' (precisely the same account that the defendant eventually gave). The defendant, of course,

> lacks standing to challenge Perdicaro's statements."

93 A.D.2d at 772; 461 N.Y.S.2d at 341-42. As noted earlier, the Court of Appeals denied petitioner's application for leave to appeal.

DISCUSSION

1. Fourth Amendment (Ground One of the Petition)

Petitioner contends that the inculpatory statements he made at the police station following the warrantless arrest in his apartment should have been suppressed because, contrary to the state courts' findings, no events intervened sufficient to attenuate the statements from the taint on the unlawful arrest. The government argues in response, inter alia, that this claim is barred by Stone v. Powell, 428 U.S. 465 (1976), in which the

Court held that federal habeas review of a fourth amendment claim is barred where the state has provided "an opportunity for full and fair litigation" of the claim.

Given the obvious foreclosure of petitioner's claim under Stone, apparently upon review of the petition herein your Honor's law clerk asked petitioner's counsel why Stone did not preclude this court's consideration of this claim. Counsel's response was set forth in a letter to the court dated May 14, 1984. He also filed a "Reply Brief and Memorandum of Law" on March 1, 1985 and sent a further letter on March 31, 1985. He appears to set forth three purported reasons as to why Stone should not bar the claim herein.

His first argument is that Stone applies only to claims challenging the admissibility of physical evidence, not oral statements. This contention hardly

merits discussion. It fails to take into account the numerous decisions in this and other circuits, as well as the United States Supreme Court, applying Stone to bar federal habeas corpus review of a fourth amendment challenge to the admissibility of a petitioner's oral statements. See, e.g., Cardwell v. Taylor, 461 U.S. 571 (1983) (per curiam); Jones v. Superintendent of Rahway State Prison, 725 F.2d 40, 42 (3d Cir. 1984); McPhail v. Warden, Attica Correctional Facility, 707 F.2d 67 (2d Cir. 1983); Pulver v. Cunningham, 562 F.2d 198 (2d Cir. 1977).

Petitioner's second theory as to why Stone does not apply herein is difficult to understand because he appears simply to contend that he should be entitled to reargue his fourth amendment claim here notwithstanding Stone. He seems to be

saying that he wishes this court to hold, notwithstanding Stone, that in circumstances of this case, where a defendant was confronted by police with a statement incriminating him made by a co-arrestee, there could not have been any attenuation of the taint of an illegal arrest. He states that Stone is inapplicable because his claim does not deal with the question of whether or not his arrest was illegal (its illegality having already been determined and conceded), but rather with the issue of attenuation, he does not present a fourth amendment claim. (Precisely what constitutional claim he presents, if not one arising from the fourth amendment, he does not say.) But this reasoning is a non sequitur. Petitioner apparently does not understand that the doctrine of attenuation is a fourth amendment issue.

Perhaps the best way to impart to your Honor the thrust of petitioner's argument on this point is to quote it. In his letter responding to your law clerk's question he wrote as follows:

> "David Bumsted has asked me to explain why Stone v. Powell, 428 U.S. 465, does not preclude this Court's consideration of Point One in Petitioner's petition and brief.
>
> Petitioner presents a very limited question to this Court, that solely involves attenuation. Precisely, he asks this Court to rule that a confrontation of an arrestee with an incriminating statement, made by a co-arrestee, does not constitute attenuation under federal law. He does not ask the Court to consider the legality of the seizure of physical evidence, or the legality of an arrest.
>
> The only Fourth Amendment issue in this case has already been resolved in petitioner's favor by the New York Appellate Division. That Court ruled that his arrest was, in fact, illegal.
>
> Two major attenuation cases (Wong Sun v. United States, 371 U.S. 471, and Brown v. Illinois, 422 U.S. 590), should persuade this Court that Petitioner does not

> present a Fourth Amendment claim . In Wong Sun, the Supreme Court spoke of attenuation as 'an intervening act of free will.' (371 U.S. at 486.) In Brown v. Illinois, the Supreme Court posed the question as : '[W]hether it was sufficiently an act of free will to purge the primary taint.' (422 U.S. at 602).
>
> In resolving the issue presented by petitioner, this Court will consider whether there was an intervening event which restored petitioner's sense of free will. Relying upon Wong Sun, and Brown v. Illinois, supra, we contend that any attenuation issue strongly interfaces with the Fifth Amendment and voluntariness. Unlike a Fourth Amendment claim that brings up searches, seizures, and arrests, the illegality of this arrest was conceded by the People. The issue we present solely involves 'free will,' whether a confrontation with incriminating evidence after an admittedly illegal arrest restored petitioner's sense of free will."

Letter from Morgan Kennedy, dated May 14, 1984, at 1-2.

Petitioner fails to recognize what Brown v. Illinois and Wong Sun v. United States make clear: the question whether a confession is the "fruit" of an illegal

arrest or, conversely, is sufficiently attenuated from the arrest as to be an act of free will and therefore admissible, is a purely fourth amendment inquiry. This inquiry is distinct from the threshold of inquiry made under the fifth amendment as to voluntariness of a confession, a distinction resting on the different policies served by the two amendments. See Brown, 422 U.S. at 602-04; Wong Sun, 371 U.S. at 486-88. See also the Court's later opinions in Taylor v. Alabama, 457 U.S. 687 (1982), and Dunaway v. New York, 442 U.S. 200 (1979). Cf. Jones v. Superintendent of Rahway State Prison, 725 F.2d at 42 ("Jones' first contention is that his confession, and all other evidence admitted at his trial, should have been suppressed as the fruit of his illegal arrest. He makes no contention that the confession was involuntary, or was obtained in the

absence of Miranda warnings. Thus no fifth amendment issue is presented. The claim rests entirely upon the fourth amendment, as interpreted in Dunaway v. New York; Wong Sun v. United States; and Traub v. Connecticut.") (citations omitted).[5]

Petitioner, by arguing that the circumstances in his case did not amount to an attenuation of the taint of the illegal arrest, merely argues that the state courts incorrectly decided the attenuation issue. But reconsideration of that issue by this court is precisely what Stone prohibits--

---

[5] As is evident, I do not understand petitioner to be contending that his confessions were not voluntary under a fifth amendment analysis. To the extent, however, that he might be attempting to convert this fourth amendment attenuation issue into a fifth amendment claim of coercion, it may be noted that as he did not present any claim in fifth amendment terms to the state courts, he would have failed to satisfy the exhaustion requirement of 28 U.S.C. § 2254(b), and this petition would have to be dismissed under the doctrine of Rose v. Lundy, 45 U.S. 509 (1982).

even if this court were to agree that the circumstances did not amount to attenuation and the state courts decided the issue wrongly. This leads us to petitioner's third and related contention as to why Stone does not bar consideration of his claim. He argues that, even if Stone were to apply to his claim, he did not have the required "full and fair opportunity" to litigate the attenuation issue because the state courts improperly analyzed the issue:

> "New York State has perverted the doctrine of attenuation. Under federal law, attenuation consists of acts that genuinely restore an arrestee's free will, such as release on bond. A confrontation with the incriminating statement of a co-arrestee definitely does not restore free will, as a conference with an attorney would."

Letter from Morgan Kennedy, dated May 14, 1984, at 3. Here, petitioner misconstrues the requirements and very purpose of the Stone doctrine. The Second Circuit has made it clear that the focus of the "full

and fair opportunity" standard is the word "opportunity," and that such an opportunity is provided where the state makes available a mechanism for the suppression of unlawfully obtained evidence. Gates v. Henderson, 568 F.2d 830 (2d Cir. 1977) (en banc), cert. denied, 434 U.S. 1038 (1978). Petitioner does not challenge the New York statutory mechanism provided for the suppression of statements obtained as a result of an unlawful arrest. Not only was he given the opportunity to litigate his claim but he fully availed himself of that opportunity through lengthy proceedings before the trial court, which he does not claim were procedurally deficient, in which the factual record was fully developed and through full review by the Appellate Division which rendered a written opinion rejecting his claim. Petitioner's challenge is thus not to the opportunity he

was given to litigate the attenuation issue, but to the way in which the state courts decided the issue. As the Second Circuit stated in Gates v. Henderson, 568 F.2d at 840, "Stone v. Powell, supra, holds that we have no authority to review the state record and grant the writ simply because we disagree with the result reached by the state courts." The language of the Fifth Circuit in Swicegood v. Alabama, 577 F.2d 1322 (5th Cir. 1978), is particularly apt here in light of petitioner's argument:

> "Appellant's second point-that the state denied him a fair hearing by misapplying federal constitutional law - must also fail. If this argument were correct, the federal courts would consider the merits of fourth amendment habeas cases whenever the state courts erred in their fourth amendment analysis and would refuse to consider the merits of those cases in which the state courts were correct. That, of course, is federal habeas review of state court fourth amendment decisions, precisely what Stone forbids. If

> the term 'fair hearing' means that the state courts must correctly apply federal constitutional law, Stone becomes a nullity."

577 F.2d at 1324. See also Gilmore v. Marks, 799 F.2d 51, 57 (3d Cir. 1986), cert. denied, 107 S. Ct. 903 (1987).

In sum, because Stone does bar this court's consideration of this first ground of the petition, it must be dismissed.

2. In Camera Examination (Ground Two of the Petition)

As his second ground for relief petitioner argues that because the information supplied by the informants via Sergeant Cuddy "constituted the essence, the core, and the main bulk of evidence brought forth to establish probable cause" for his arrest, the trial court's refusal either to compel disclosure of the informants' identities or to allow defense counsel to participate in the in camera

examination of Cuddy and the informants during the suppression hearing violated petitioner's right to confrontation under the sixth amendment.

However, unlike a confrontation clause challenge based on events occurring at trial, petitioner's claim challenges not the fairness of his conviction but the adequacy of the procedures followed in determining the legality of his arrest and is therefore not an issue cognizable on a habeas corpus petition. A federal court may issue a writ of habeas corpus only upon the ground that a person is in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In United States v. Crews, 445 U.S. 463, 474 (1980), the Supreme Court was unanimous in its holding that "[a]n illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as

a defense to a valid conviction." Federal courts have consistently refused to recognize a claim of illegal arrest as a basis for habeas corpus review. See, e.g., United States ex rel. Pella v. Reid, 527 F.2d 380, 382 (2d Cir. 1975); Houser v. United States, 508 F.2d 509, 514 (8th Cir. 1974); United States ex rel. Burgett v. Wilkins, 283 F.2d 306 (2d Cir. 1960); United States ex rel. Dampier v. O'Leary, 595 F. Supp. 747, 749 (N.D. Ill. 1984); Burtis v. Dalsheim, 536 F. Supp. 805, 806-07 (S.D.N.Y. 1982). Thus, petitioner's challenge must be dismissed.

Moreover, in the context of this case, this claim is nonsensical. Assuming arguendo that petitioner is correct on the merits of this claim and the trial court erred in conducting the in camera examinations, the ultimate finding for which he could hope is that his arrest was

illegal because there was no probable cause to support it. But, it has already been determined that petitioner's arrest was illegal under Payton v. New York, regardless of the issue of probable cause. This claim, therefore, apart from its being not cognizable as a challenge to the conviction, is especially frivolous in the context of this petition. The very most petitioner could hope to establish -- the illegality of his arrest -- is already established in the record.

3. Conduct the Trial Judge (Ground Three of the Petition)

Petitioner's third claim for relief is that various acts by the trial judge deprived him of a fair trial. Specifically, he claims that the court intimidated Christine Perdicaro by admonishing her against committing perjury

after she gave testimony favorable to the petitioner. Petitioner further argues that the court undermined the credibility of the defense by actively questioning Perdicaro during petitioner's cross-examination, by communicating its disbelief of her testimony by asking if she actually remembered the events at the time the police allegedly coerced her prior statements inculpating petitioner (see p. 6, supra), and by assuming certain facial expressions during her cross-examination. Petitioner also claims that the court's exchange with defense counsel in the presence of the jury concerning an issue of hearsay (see p. 7, supra) further denied him a fair trial.

The Constitution sets limits upon a judge's intervention in a criminal jury trial. The fifth and fourteenth amendments require criminal prosecutions to be

conducted within the bounds of fundamental fairness. See, e.g., Taylor v. Hayes, 418 U.S. 488, 501-02 (1974); Rochin v. California, 342 U.S. 165 (1952). A trial judge's intervention in a criminal case could rise to the level of a due process violation if it were sufficiently excessive and prejudicial. Gayle v. Scully, 779 F.2d 802, 812-13 (2d Cir. 1985), cert. denied, 107 S. Ct. 139 (1987); Daye v. Attorney General of the State of New York, 712 F.2d 1566, 1570 (2d Cir. 1983), cert. denied, 464 U.S. 1048 (1984). While the constitutional standard to be applied when a federal habeas corpus court reviews a state trial judge's conduct is "somewhat ill-defined," Johnson v. Scully, 727 F.2d

222, 226 (2d Cir. 1984),[6] the Second Circuit stated that,

> "A trial judge's intervention in the conduct of a criminal trial would have to reach a significant extent and be adverse to the defendant to a substantial degree before the risk of either impaired functioning of the jury or lack of the appearance of a neutral judge conducting a fair trial exceeded constitutional limits."

Daye v. Attorney General, 712 F.2d at 1572. See also Garcia v. Warden, Dannemora Correctional Facility, 795 F.2d 5, 8 (2d Cir. 1986). The bottom line is fundamental fairness to the defendant, viewing the judge's conduct in light of the totality of events occurring at trial, Gayle v. Scully, 779 F.2d at 812, and "it is abundantly clear that only infrequently does intervention by a trial judge rise to

---

[6] A higher standard of conduct is applied "by both federal and state appellate courts in exercising their supervisory authority over the administration of criminal justice within their respective jurisdictions." Johnson v. Scully, 727 F.2d at 226; Daye v. Attorney General, 712 F.2d at 1571.

the level of a due process violation." Id. at 806 (no due process violation even though trial judge made frequent statements "which may be described as caustic and sometimes sarcastic - still other comments were gratuitous and might have been better left unsaid," id. at 807); see also Garcia v. Warden, 795 F.2d at 8 (no due process violation "[a]lthough we would not recommend that the trial record in the instant case be used as a model for fledgling judges"); Johnson v. Scully, 727 F.2d at 227 (no due process violation even though "the trial judge strayed a considerable distance from the model of a neutral magistrate. His interventions in the trial were far more extensive than what is normally appropriate for a trial judge endeavoring to expedite proceedings and assist the jury's understanding."). Under the standard of fundamental fairness, as

further elucidated by the specific factual contexts presented in these cases, the judge at petitioner's trial must be found to have acted within the bounds of constitutional propriety. A thorough examination of the record as a whole reveals that petitioner was not denied a fair trial.

First, in weighing the possible prejudicial effect of a warning regarding perjury, a court must consider the setting in which the incident takes place. In the present case, the judge advised Perdicaro out of the presence of the jury about committing perjury after she had repeatedly testified that she could not remember certain events about which she had given a statement to the police as well as testimony to the grand jury. Under these circumstances, an admonition against testifying falsely does not constitute

improper intimidation or coercion of the witness to whom it is addressed. Bruno v. LaVallee, 584 F.2d 590, 593 (2d Cir. 1978).

Nor did the judge act improperly by asking questions during petitioner's cross-examination of Perdicaro. The page references cited by petitioner as allegedly improper questioning all appear to be instances in which the judge questioned Perdicaro in an effort to have her clarify, complete or expand upon her answers (Tr. 325, 339, 340, 344, 348, 363, 364, 374, 375), or to correct a misstatement by counsel (Tr. 360), or to ask for an answer to be repeated that was apparently difficult to hear (Tr. 376), or to elicit information in order to rule on an objection (Tr. 378). The questioning of a witness by a trial judge for such purposes is clearly proper, and, indeed, falls well within the trial judge's "active

responsibility to insure that issues are clearly presented to the jury." United States v. Pisani, 773 F.2d 397, 403 (2d Cir. 1985), reh'g denied, 787 F.2d 71 (2d Cir. 1986); see also United States v. Bronston, 658 F.2d 920, 930 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982); United States v. Vega, 589 F.2d 1147, 1152-53 (2d Cir. 1978). Moreover, it is clear that the court's questions did not serve to undermine the petitioner's defense and, in fact, may have bolstered his case. For example, in one of the exchanges challenged by petitioner, petitioner's attorney asked Perdicaro about the statement she made to the police following her arrest. The court's questioning elicited Perdicaro's testimony that the police had told her everything to say (Tr. 339-40).

Petitioner's contention that the court prejudiced him by communicating a disbelief of Perdicaro's testimony is similarly without merit. This claim arises from the judge's asking Perdicaro to confirm that she could remember the circumstances of the police's allegedly coercing her statements inculpating petitioner after her earlier testimony as to her lack of memory (Tr. 342), and from the judge's allegedly assuming certain facial expressions during her cross-examination. Evaluation of this claim is necessarily difficult, as this court's review is limited to "'the cold black and white of a printed record.'" United States v. Grunberger, 431 F.2d 1062, 1067 (2d Cir. 1970) (quoting United States v. Ah Kee Eng, 241 F.2d 157, 161 (2d Cir. 1957)). See also United States v. Pisani, 773 F.2d at 402. Again, however, the reviewing court must view the challenged

conduct of the trial court in the context of the proceedings as a whole. United States v. DiPaolo, 804 F.2d 225, 232 (2d Cir. 1986); United States v. Carpenter, 776 F.2d 1291, 1294 (5th Cir. 1985). A careful reading of Perdicaro's cross-examination certainly does not reveal that the judge's conduct communicated disbelief of her testimony. In any event, I find that even if Justice Greenfield's questioning could be viewed as having communicated a disbelief of portions of Perdicaro's testimony, when viewed in the context of the trial as a whole, it is abundantly clear that his conduct did not deprive petitioner of a fair trial. See United States v. Carpenter, 776 F.2d at 1295.

Petitioner's remaining contention, that the judge's exchange with defense counsel over an evidentiary point wherein the trial

judge stated, "You purport to have gone to law school," deprived him of a fair trial must also be dismissed. The judge's sarcasm would undoubtedly have been better left unexpressed. However, the remarks appear to have been relatively innocuous and appear as an isolated incident in a trial transcript that is more than eleven hundred pages in length. Moreover, the record further indicates that the judge's remarks were provoked by a comment made by counsel after the judge sustained an objection to counsel's question and also by the judge's belief that counsel had acted improperly in asking the question which was similar to one to which the judge had already just sustained an objection. Misconduct by defense counsel is properly taken into account in determining whether a defendant has been prejudiced by a judge's response thereto. United States v.

DiPaolo, 804 F.2d at 230-32; United States v. Pisani, 773 F.2d at 404; United States v. Robinson, 635 F.2d 981, 985 (2d Cir. 1980), cert. denied, 451 U.S. 992 (1981).

Finally, to the extent that the trial judge's conduct may have been viewed by any of the jury to have shown bias, the judge's instructions to the jury would have obviated any such residual effect. See United States v. Bronston, 658 F.2d at 930; United States v. Williams, 575 F.2d 388, 392 (2d Cir.), cert. denied, 439 U.S. 842 (1978). The court instructed the jury not to draw any inferences from the court's ruling on objections; that the court's questions to the witnesses were designed only to elicit or clarify facts and not to aid either the prosecution or the defense; and that its admonitions to the attorneys should play no role in the jury's deliberations (Tr. 1039-41).[7] Such an

---

[7] The court instructed as follows:

"Now, the Court has the function

(footnote continued)

not only of ruling on the admissibility of evidence and instructing you as to the law, and seeing to it that the trial moves forward with a reasonable degree of expedition consonant with fairness and justice, the Court has also felt that it had the obligation to see that the facts were made clear to you.

So during the course of the trial, the Court has only ruled on the objections, and you certainly can draw no inferences from the Court's rulings on objections, that the Court's rulings were favoring one side or the other.

The Court's rulings were made strictly in accordance with our rules of evidence.

Similarly, when the Court asked questions of witnesses, that was not designed to aid one side or the other, but to attempt to elicit the facts, to clarify them for your understanding, to ask the very kinds of questions the Court would anticipate would be in your mind at that moment. And so, you should draw no inferences from the fact that the Court, from time to time, may have asked a question, or may have elicited a particular answer. Whatever it was, whoever it favored, the facts are there for you to determine.

Now it may also have occurred during the course of this trial that the Court had occasion to admonish attorneys for overstepping certain bounds which the Court believes should properly be drawn. What the Court says to an attorney with respect to limiting

(footnote continued)

instruction sufficed to eliminate any error that may be deemed to have been committed. See United States v. Williams, 575 F.2d at 392; United States ex rel. Eccleston v. Henderson, 534 F. Supp. 813, 818 (E.D.N.Y.), aff'd, 697 F.2d 289, cert. denied, 459 U.S. 871 (1982).

> what evidence should come before you, again, should play no part in your determination of the merits of this case.
>
> It sometimes happens that attorneys, in their zeal, will overstep the proper bounds. Sometimes, it is inadvertent and sometimes, it is deliberate; I don't pass judgment on that. It is my job to see that only properly admissible evidence comes before you, and therefore, the Court may feel that it is necessary to admonish an attorney if something improper is done.
>
> That has nothing to do with the guilt or innocence of this defendant, so you put that out of your minds entirely."

(Tr. 1039-41.)

CONCLUSION

For the reasons set forth herein, I respectfully recommend that this petition be dismissed as to Ground One and Ground Two and denied as to Ground Three.

Copies of this Report and Recommendation have been mailed this date to the following:

Morgan Kennedy, Esq.
133 East 15th Street
New York, New York 10003

Michael A. Schwartz, Esq.
Assistant District Attorney
One Hogan Place
New York, New York 10013

The parties are hereby directed that if you have any objections to this Report and Recommendation you must, within ten (10) days from today, make them in writing, file them with the Clerk of the Court and send copies to the Honorable Thomas P. Griesa, to the opposing party and to the undersigned. Failure to file objections within the specified time may waive your right to appeal from any order that will be

entered by Judge Griesa. See Thomas v. Arn, 474 U.S. 140 (1985), reh'g denied, 106 S. Ct. 899 (1986); McCarthy v. Manson, 714 F.2d 234, 237 (2d Cir. 1983).

Dated: New York, New York
October 2, 1987

Respectfully submitted,

SHARON E. GRUBIN

United States Magistrate

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MIGUEL MATOS, Petitioner,	
- against -	84 Civ. 2711 (TPG)
EUGENE S. LEFEVRE, Superintendent, Clinton Correctional Facility, Respondent.	ORDER

The thorough and well-reasoned report and recommendation of Magistrate Grubin is approved and adopted. Petitioner's objections have no merit.

The habeas corpus petition is dismissed.

SO ORDERED.

Dated: New York, New York
October 30, 1987

THOMAS P. GRIESA
U.S.D.J.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 21, 1983

Justice Presiding

Present--Hon. Leonard H. Sandler,
Joseph P. Sullivan
David Ross
John Carro
E. Leo Milonas,
Justices.

The People of the State of New York, Respondent, - against - Miguel Matos, Defendant-Appellant.	Order of Affirmance on Appeal from Judgment 16203

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court. New York

County (Greenfield, J.), rendered on July 1, 1980, convicting defendant of murder in the second degree, and said appeal having been argued by Morgan Kennedy of counsel for the appellant, and by Russell A. Bikoff of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

JOSEPH J. LUCCHI,

Clerk.

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Sandler, J.P., Sullivan, Ross, Carro, Milonas, JJ.

16203

The People of the State of New York,

Respondent,

R.A. Bikoff

- against -

Miguel Matos,

Defendant-Appellant.

M. Kennedy

Judgment of the Supreme Court, New York County (Greenfield, J.), rendered on July 1, 1980, convicting the defendant, after a jury trial, of two counts of murder in the second degree and sentencing him to concurrent sentences of twenty years to life and twenty-five years to life, is unanimously affirmed.

On March 12, 1979, largely as the result of information supplied by an informant, police officers entered defendant's apartment without and placed him and his girlfriend, Christine Perdicaro under arrest. The couple were driven separately to the stationhouse. During the trip to the precinct, the detectives advised Perdicaro that they were investigating the homicides of Charles Fashaw and Karen Guy. Perdicaro thereupon made statements implicating the defendant in the killings. Although the record reveals that the police did, in fact, possess probable cause to arrest defendant at the time that they entered his apartment, a warrantless arrest effected in a suspect's home is unlawful in the absence of exigent circumstances. (Payton v. New York, 445 U.S. 573; see also United States v. Johnson, ____ U.S. ____, 102 S.Ct. 2579)

The People concede that Payton is applicable to the instant case. They also do not dispute the propriety of the hearing court's determination that no exigent circumstances existed in the present situation to support a warrantless arrest. However, defendant's inculpatory statements in the station house one and one-half hours after he was arrested, and after he received his Miranda warnings, were admissible, inasmuch as any potential taint because of the circumstances of the arrest had been attenuated in the interval. His statements were voluntarily made and were elicited after Perdicaro's statements implicating him had been made to the police, and after he had been advised that "she told us about the rape" (precisely the same account that the defendant eventually gave). The defendant of course, lacks standing to challenge Perdicaro's

statements. (See People v. Henley, 53 NY2d 403)

Order filed.

(2)

No. 88-146

IN THE

Supreme Court of the United States

October Term 1988

MIGUEL MATOS,

Petitioner,

-against-

EUGENE S. LeFEVRE, Superintendent,
Clinton Correctional Facility,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent
One Hogan Place
New York, New York 10013
(212) 553-9000

DONALD J. SIEWERT
MICHAEL SCHWARTZ
ASSISTANT DISTRICT ATTORNEYS
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

No. 88-146

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MIGUEL MATOS,

Petitioner,

-against-

EUGENE S. LEFEVRE, Superintendent,
Clinton Correctional Facility,

Respondent.

On Petition for Writ
of Certiorari to the
United States Court
of Appeals for the
Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner Miguel Matos seeks a writ of certiorari to review a May 24, 1988 judgment of the United States Court of Appeals for the Second Circuit. By that judgment, the Court of Appeals denied petitioner's motion for a

certificate of probable cause and dismissed his appeal from an October 30, 1987 order of the United States District Court for the Southern District of New York (Thomas P. Griesa, D. J.), which had denied petitioner's application for a writ of habeas corpus (A-1, A-51).*

In his habeas corpus petition, petitioner challenged his July 1, 1980 conviction in New York State Supreme Court, New York County (Edward Greenfield, J.), after a jury trial, of two counts of Murder in the Second Degree (New York Penal Law §125.25). Petitioner was sentenced to life imprisonment, and is presently incarcerated pursuant to his New York conviction.

---

*Parenthetical references preceded by `A' and `B' are to petitioner's appendix and brief respectively.

STATEMENT OF THE CASE

On January 24, 1979, petitioner and his girlfriend, Christine Perdicaro, went to Charles Fashaw's apartment at 345 East 94th Street in Manhattan. Fashaw was a drug dealer who had supplied petitioner with drugs. Petitioner shot and killed Fashaw with a pistol, and then shot and killed Fashaw's girlfriend, Karen Guy.

Acting primarily on information provided by two informants, police officers entered petitioner's Manhattan apartment on March 12, 1979, and arrested petitioner and Perdicaro. The officers had not obtained a warrant before entering the apartment. As Perdicaro was being driven to the precinct, she told the officers that Fashaw had raped her before the shooting. At the precinct, petitioner received Miranda warnings and

waived his rights. After the police informed him of Perdicaro's statements, he admitted that he had killed Fashaw and Guy to avenge the alleged rape. On March 15, 1979, petitioner was charged with two counts of Murder in the Second Degree (New York County Indictment No. 1115/79).

Petitioner moved to suppress his statements at the precinct, alleging that they were fruits of an arrest without probable cause. A hearing commenced on January 8, 1980, before Justice Edward Greenfield. During the hearing, the court examined the two informants and an investigator from the Nassau County District Attorney's office in camera on the issue of probable cause.

On February 5, 1980, Justice Greenfield denied petitioner's motion, holding that the police had probable cause to arrest him, and that his

statements had been voluntary. Petitioner had not argued that the police had improperly entered his home without a warrant, since the controlling New York decision on that issue, People v. Payton, 45 N.Y.2d 300 1978, allowed such warrantless entries by the police. However, on April 15, 1980, the United States Supreme Court reversed Payton and held that the police must obtain warrants to make routine arrests of felony suspects in their homes. Payton v. New York, 445 U.S. 573 1980. Justice Greenfield sua sponte reconsidered his ruling, and on May 9, 1980, ruled that the Payton decision had no retroactive application to petitioner's arrest, and reaffirmed his order denying petitioner's motion to suppress his statements. On June 21, 1982, this Court held that Payton v. New York was retroactive to all

convictions not yet final at the time of that decision. United States v. Johnson, 457 U.S. 537 (1982).

On May 19, 1980, petitioner was convicted on both counts of second-degree murder, and on July 1, 1980, he was sentenced to concurrent prison terms of from twenty and twenty-five years to life. Petitioner appealed, and on April 21, 1983, the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed petitioner's conviction. The Appellate Division held that although there had been a Payton violation, suppression of petitioner's statements was not required because the taint had been attenuated by petitioner's receipt of Miranda warnings and his learning of Perdicaro's statements (A-52-57). 93 A.D.2d 772. Leave to appeal to

the New York Court of Appeals was denied on June 17, 1983. 59 N.Y.2d 975.

In his petition for a writ of habeas corpus, petitioner advanced three arguments in support of his claim that his federal constitutional rights had been violated. First, petitioner asserted that his warrantless arrest had been illegal, and that nothing after his arrest attenuated the taint attaching to his statements. Second, he contended that Justice Greenfield had violated his Sixth Amendment rights by taking testimony in camera during the suppression hearing. Finally, petitioner claimed that the trial judge had deprived him of a fair trial by, inter alia, the manner in which he questioned a defense witness.

In a report and recommendation to the District Court, United States

Magistrate Sharon E. Grubin rejected petitioner's first claim as barred from federal judicial review by Stone v. Powell, 428 U.S. 465 1976, because the State of New York had afforded petitioner an opportunity for full and fair litigation of that claim (A-21-32). Magistrate Grubin rejected petitioner's second claim because it challenged the hearing court's refusal to disclose the identities of the informants and to permit petitioner to participate in the in camera questioning, an issue not cognizable on a federal habeas corpus petition. The magistrate also noted that the issue, in any event, was not the legality of petitioner's arrest, which was concededly illegal under Payton v. New York, but attenuation of the taint (A-32-35). Finally, Magistrate Grubin reviewed each of petitioner's

attacks on Justice Greenfield's conduct of the trial and found no merit to any of these claims (A-35-48). The magistrate recommended that the petition be dismissed as to petitioner's first two claims and denied as to the third (A-49).

On October 30, 1987, Judge Griesa approved and adopted Magistrate Grubin's report and recommendation, and dismissed petitioner's application (A-51). On May 24, 1988, the Second Circuit denied petitioner's application for a certificate of probable cause and dismissed his appeal (A-1-2).

THE PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks certiorari to review two contentions: that the record does not support a finding of attenuation between his illegal arrest and his stationhouse statements, and that Stone

v. Powell, 428 U.S. 465 (1976), does not bar federal habeas corpus review of this claim. Petitioner does not press the Sixth Amendment and fair trial claims raised in his habeas corpus petition.

REASONS FOR DENYING THE WRIT

1. As a general rule, certiorari is granted only when there are special and important reasons for granting it, for example, in cases of conflict among decisions of the lower courts or when the lower courts have decided important questions of federal law which have not been, but should be, settled by this Court. See Rules of the Supreme Court of the United States, Rule 17 (1988). The purposes of certiorari are not served by review in this Court of decisions which involve no conflict among the lower courts, and which present no novel or unresolved issues of law, but

turn instead on the application of established principle to particular factual situations. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

In his petition for a writ of certiorari, petitioner claims that Stone v. Powell, 428 U.S. 465 (1976), does not preclude him from raising in a federal habeas corpus proceeding his objection to the admission of his precinct statements (B8-9). However, petitioner's claim arises under the Fourth Amendment, and it is well settled among the federal circuits both that Stone v. Powell bars federal habeas corpus review of Fourth Amendment claims generally, provided that the petitioner has had the opportunity to

litigate them in the state courts,* and more particularly, that this rule bars review of the question whether intervening events have so attenuated the taint resulting from a Fourth Amendment violation as to remove any basis for excluding the petitioner's later-obtained voluntary statements.** Petitioner

---

*See, e.g, United States v. Brown, 663 F.2d 229, 234 (D.C. Cir. 1981); Neron v. Tierney, 841 F.2d 1197, 1199 (1st Cir. 1988); Jackson v. Scully, 781 F.2d 291, 297 (2nd Cir. 1986); Gilmore v. Marks, 799 F.2d 51, 54 (3rd Cir. 1986); Griffen v. Aiken, 775 F.2d 1226, 1234 (4th Cir. 1985); Penry v. Lynaugh, 832 F.2d 915, 918 (5th Cir. 1987); Jennings v. Rees, 800 F.2d 72, 75 (6th Cir. 1986); Willard v. Pearson, 823 F.2d 1141, 1149 (7th Cir. 1987); Clark v. Wood, 823 F.2d 1241, 1250 (8th Cir. 1987); Knaubert v. Goldsmith, 791 F.2d 722, 725 (9th Cir. 1986); Yanez v. Romero, 619 F.2d 851, 853 (10th Cir. 1980); Agee v. White, 809 F.2d 1487, 1490 (11th Cir. 1987).

**Cardwell v. Taylor, 461 U.S. 571 (1983); Jones v. Superintendent of Rahway State Prison, 725 F.2d 40, 42 (3rd Cir. 1984); Willard v. Pearson, 823 F.2d 1141, 1149 (7th Cir. 1987); Agee v. White, 809 F.2d 1487, 1490 (11th Cir. 1987); United States ex rel. Mark v. Chrans, 670

submits no acceptable reason for reconsidering these well-settled principles. On the contrary, his petition involves nothing more than the application of these principles to the particular facts of this case, and petitioner in fact is asking this Court to review his claims simply in order to achieve a different result. Such a request is not a valid basis for granting a writ of certiorari.

Petitioner also contends that the record does not support the hearing judge's finding of attenuation between his illegal arrest and those statements (id.). But obviously, this contention may not be reviewed in light of Stone v.

F.Supp. 1401, 1403 (N.D. Ill. 1987); Allen v. Dutton, 630 F.Supp. 379, 385 (M.D. Tenn. 1984) aff'd, 785 F.2d 307 (M.D. Tenn. 1986); Woodard v. Sargent, 567 F.Supp. 1548, 1551 (E.D. Ark. 1983), rev'd on other grounds, 753 F.2d 694 (8th Cir), cert. denied, 474 U.S. 1013 (1985).

Powell (see pages 14-18 below); and here, too, in any event, petitioner adduces no more persuasive basis for certiorari than his desire to overturn the result below. This Court should reject petitioner's invitation to parse the record once again and duplicate the work of the New York courts and the federal courts below.

2. Even should this Court not be persuaded by these considerations, the writ should still be denied, because no different result could be justified on the record before the Court. The District Court's application of Stone v. Powell was dictated by the reasoning of that case, that a state prisoner may not be granted federal habeas corpus relief on the ground that evidence seized in violation of the Fourth Amendment has been admitted at his trial provided the state has given him an opportunity for

full and fair litigation of his Fourth Amendment claim. 428 U.S. at 494. That reasoning applies squarely to this case, as is clear from Cardwell v. Taylor, supra, and petitioner's assertion that Stone v. Powell does not apply to Fourth Amendment claims involving oral confessions cannot be honored short of overruling Stone v. Powell and Cardwell v. Taylor themselves.

Petitioner is mistaken in suggesting that Chief Justice Burger's concurring opinion in Stone v. Powell indicates that the rule of that case is limited "to tangible physical evidence, like drugs or weapons, rather than confessions" (B13). This suggestion is apparently based on the following statement in Chief Justice Burger's concurrence:

> If a suspect's will has been overborne, a cloud hangs over

> his custodial admissions; the exclusion of such statements is based essentially on their lack of reliability. That is not the case as to reliable evidence -- a pistol, a packet of heroin, counterfeit money, or the body of a murder victim -- which may be judicially declared to be the result of an "unreasonable" search. The reliability of such evidence is beyond question; its probative value is certain. 428 U.S. at 496-97.

But petitioner misreads these words: the Chief Justice did not suggest that Stone v. Powell applies only to physical evidence, but merely contrasted the Fourth Amendment exclusionary rule with the Fifth Amendment's protection against compelled self-incrimination. Of course, even if petitioner's construction of the quoted passage were correct, it could not represent the law, since this Court has ruled in Cardwell v. Taylor, supra, that the Stone v. Powell bar extends to oral confessions.

Petitioner is also wrong in contending that the congressional grant of subject-matter jurisdiction, 28 U.S.C. §§1331, 1346(a)(2) and 2254(a), precludes federal district courts from refusing to entertain a Fourth Amendment claim (B13-14). This argument was squarely rejected by the majority in Stone v. Powell, who stated emphatically, "Our decision today is not concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally." 428 U.S. at 495 n. 37. This Court held that federal courts need not apply the exclusionary rule on habeas review of Fourth Amendment claims unless the state prisoner was denied the opportunity for full and fair litigation in the state courts, but the Court made clear that this holding "does not mean that the federal court lacks jurisdiction

over such a claim, but only that the application of the [exclusionary] rule is limited to cases in which there has been both such a showing and a Fourth Amendment violation." Stone v. Powell, 428 U.S. at 494-95, n. 37.

In other words, Stone v. Powell did not limit the federal court's jurisdiction over Fourth Amendment claims, but simply refused to extend the judge-made exclusionary rule to such claims when they are raised in a habeas corpus petition, because the justification for the exclusionary rule "becomes minimal where federal habeas corpus relief is sought by a prisoner who previously has been afforded the opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct review." 428 U.S. at 486. Petitioner has never

alleged that he was denied the opportunity by the New York courts for full and fair consideration of his claim that his statements were tainted by his illegal arrest, and that claim is therefore barred from federal habeas review.

3. In any event, the record overwhelmingly supports the Appellate Division's finding that petitioner's unlawful arrest did not taint his later statements at the stationhouse. Under traditional standards, a precondition for finding attenuation of a Fourth Amendment violation alleged to precede an incriminating statement is that the statement was made after proper Miranda warnings and was voluntary under the Fifth Amendment. Once that condition is satisfied, such factors as the "temporal proximity of the arrest and the

confession, the presence of intervening circumstances ... and, particularly, the purpose and flagrancy of the official misconduct" may all serve to demonstrate that the statement is "sufficiently an act of free will to purge the primary taint." Brown v. Illinois, 422 U.S. 590, 603-04 (1975); Wong Sun v. United States, 371 U.S. 471, 486 (1963).

In petitioner's case, as the state courts found, the precondition for attenuation was satisfied, because petitioner did receive Miranda warnings and his statements were in fact voluntary (A-56). Moreover, all three factors discussed in Brown v. Illinois, supra, indicate that petitioner's statements were not tainted by the Payton violation. First, the time between petitioner's warrantless arrest at his home and his first statement to the police was about

one and one-half hours, sufficient to establish a definite chronological break between the arrest and the interrogation. In any event, the length of detention is an ambiguous factor, since "a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one." Dunaway v. New York, 442 U.S. 200, 220 (1979) (Stevens, J., concurring). What is significant here is that the one and one-half hours passed without any questioning. Cf. Taylor v. Alabama, 457 U.S. 687, 691 (1982) (six hours elapsed, but prosecution failed to show how much of this time was spent in interrogation). And there is no indication that the circumstances of petitioner's detention were in any respect severe, or that the stationhouse atmosphere was specially coercive, beyond the coercion inherent in

any police custody. Cf. Rawlings v. Kentucky, 448 U.S. 98, 107-08 (1980) (congenial detention atmosphere more significant than brief time period between illegal arrest and suspect's admissions).

Second, a significant intervening event occurred between petitioner's arrest and his statement: Christine Perdicaro implicated petitioner while she was being driven to the stationhouse, and petitioner learned of at least part of Perdicaro's statement when the police informed him that Perdicaro had told them about the rape which could have given petitioner a motive for killing Fashaw. It is certainly fair to infer that it was this information, with its obvious implication that Perdicaro was willing to cooperate with the police, which prompted

petitioner to speak, rather than any exploitation by the police of the Payton illegality.

Third, there was no flagrant police conduct in petitioner's case, and this factor appears to be the most important. See Brown v. Illinois, 422 U.S. at 609-12 (Powell, J., concurring); Dunaway v. New York, 442 U.S. at 226-27 (Rehnquist, J., dissenting); see also People v. Martinez, 37 N.Y.2d 662, 668-70 1975. When the police arrested petitioner, they had probable cause and they were relying upon a New York statute, Criminal Procedure Law Section 140.15, that authorized arrests without a warrant inside a suspect's home. That statute had been upheld by the New York Court of Appeals over a claim that it conflicted with the Fourth Amendment. People v. Payton, 45 N.Y.2d 300 (1978).

Therefore, the police proceeded with absolute good faith in believing they could properly enter petitioner's apartment without a warrant. See People v. Martinez, 37 N.Y.2d at 668. Further, the police did not attempt to gather evidence inside petitioner's apartment and did not try to obtain his statement there. And there is no showing that petitioner was intimidated, provoked, or at all mistreated inside his apartment, or for that matter elsewhere, in order to overcome a reluctance to speak to the officers. See People v. Rogers, 52 N.Y.2d 527, 534 (1981); cf. Brown v. Illinois, 422 U.S. at 605 (police engaged in flagrant misconduct to provoke statement).

In light of all these circumstances, the New York courts correctly found that the warrantless

arrest in petitioner's apartment did not taint his subsequent statements, and that no legitimate deterrent purpose would be served by suppressing petitioner's statements.

CONCLUSION

The instant petition should be denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

DONALD J. SIEWERT
MICHAEL SCHWARTZ
Assistant District Attorneys
Of Counsel

September 21, 1988